

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 19-CI-0087
Electronically Filed

COMMONWEALTH OF KENTUCKY
OFFICE OF THE SECRETARY OF STATE, *ex rel.*
ALISON LUNDERGAN GRIMES, in her official
capacity as Secretary of State of the Commonwealth
of Kentucky

PLAINTIFF

v.

**PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

JARED DEARING

DEFENDANT

and

JENNIFER SCUTCHFIELD

DEFENDANT

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**** *
**** *

Plaintiff, the Commonwealth of Kentucky Office of the Secretary of State, *ex rel.* Alison Lundergan Grimes, in her official capacity as Secretary of State ("Plaintiff" or "the Office of the Secretary of State"), for its response in opposition to Defendants' Motion to Dismiss, states as follows.

INTRODUCTION AND FACTUAL BACKGROUND

Federal law explicitly requires the Secretary of State, as Kentucky's Chief Election Officer, to create and have access to Kentucky's Voter Registration System ("VRS"). The Help America Vote Act of 2002 ("HAVA") requires

each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State . . .

52 U.S.C. § 21083(a)(1)(A)(emphasis added), attached as **Exhibit 1**. The statute continues, “*Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.*” *Id.* at § 21083(a)(1)(A)(v)(emphasis added).

The National Voter Registration Act of 1993 (“NVRA”) also requires the Secretary of State to utilize the VRS. In fact, 52 U.S.C. § 20509 provides that the chief election official is “responsible for the coordination of State responsibilities under this chapter.” The Secretary of State is responsible for a multitude of federal statutory obligations related to the administration of voter registration. Examples include “ensuring the maintenance of an accurate and current registration roll for elections for Federal office.” 52 U.S.C. § 20507. 52 U.S.C. § 20510(b) permits aggrieved citizens to provide written notice of violations of the NVRA to the Secretary of State. An example of such a complaint would include a person who registered to vote in a timely manner but who was prohibited from voting at a precinct due to the VRS not reflecting the registration. The Office of the Secretary of State would be responsible for attempting to correct such an issue.

Federal regulations require the Secretary of State to access the VRS. In fact, 11 C.F.R. § 9428.7(a), attached as **Exhibit 2**, requires the Secretary of State to provide an extensive report by March 31 of every odd-numbered year to the federal government containing data from the VRS.

These are but a few of the numerous federal and state laws that require that the Office of the Secretary of State, as the Chief Election Officer of the Commonwealth and the Chair of the Kentucky State Board of Elections (“SBE”), to have access to the VRS. Other federal laws include the Voting Rights Act of 1965 (“VRA”), the Uniformed and Overseas Citizens Absentee

Voting Act of 1986 (“UOCAVA”), and the Military and Overseas Voters Empowerment Act of 2009 (“MOVE”).

Despite these clear authorities and other laws requiring VRS access, Defendants—the current Executive Director of the SBE and Assistant to the Executive Director of the SBE— and apparently the Public Protection Cabinet admit that they have a contrary opinion. They maintain that it is improper for Plaintiff, a duly elected Constitutional officer, Chair of the SBE, and the Chief Election Official of the Commonwealth of Kentucky, to have *any* access to the VRS. This legal opinion is directly contrary to substantial legal authority and is causing harm to the ability of the Office of the Secretary of State to fulfill its statutory obligations to ensure free and fair elections.

In their motion to dismiss, Defendants admit that they hold the incorrect opinion that it is “improper” for the Office of the Secretary of State to access the VRS. They refer to their position as a “mere difference of opinion” and argue their opinion is insufficient to rise to the level of an actual, justiciable controversy. *See* Mot. to Dis. at 5. Their argument is inconsistent with their high-level positions and the actions they have taken in furtherance of their “opinion.” It also fails to recognize the chilling effect that their incorrect “opinion” has on their subordinates who are responsible for carrying out many of the duties for which the Secretary of State is responsible as well as on the employees of the Office of the Secretary of State.

Defendants are the two highest ranking employees of the SBE and are appointed pursuant to statute. They are high-level government officials with managerial responsibility over the staff of SBE. Defendant Scutchfield is also a lawyer for the Commonwealth of Kentucky by Executive Order of the Governor. To suggest that her perpetuation of an incorrect legal opinion

has no impact on the operation of the election functions is flawed. Members of the SBE staff accord more weight to her legal opinions than they would to others’.

Moreover, Defendants have gone beyond simply holding an incorrect opinion. On August 27, 2018, Defendants Dearing wrote a letter addressed to the members of the SBE (the “Letter”). Compl. ¶ 11. Defendant Dearing asserted in the Letter that employees of the Office of the Secretary of State have improperly accessed the VRS. *Id.* ¶ 12. The Letter indicates that Defendant Dearing mistakenly believes that it is improper for the Secretary of State to have *any access* to the VRS database. Defendant Scutchfield, the Assistant to the Executive Director as well as an attorney for the Commonwealth, has failed to correct the legal misinterpretations of Defendant Dearing and, to the contrary, has advised SBE staff in a manner inconsistent with the right of the Office of the Secretary of State to access the VRS. *Id.* ¶ 14. They have initiated several administrative investigations based on this erroneous legal opinion. They have divulged records reflecting the Office of the Secretary of State’s access to the VRS to the news media, resulting in publication of a news article that cited Dearing’s incorrect opinion and suggested that Plaintiff’s access to the VRS database is improper. Specifically, Defendants divulged information to journalists from *ProPublica* and the *Lexington Herald-Leader* resulting in published articles stating that Plaintiff’s mere access to the VRS is improper.¹ These actions have caused additional confusion and disruption among SBE staff and employees of the Office of the Secretary of State, directly impairing Plaintiff’s efforts to comply with the various legal requirements set out above. *See* Mary Sue Helm Affidavit, attached as **Exhibit 3**, ¶ 6. Thus, Defendants have taken action on their incorrect “opinion” and have impaired Plaintiff’s ability to carry out Plaintiff’s duties under federal and state law.

¹ *See, e.g.,* Jessica Huseman and Daniel Desrochers, *A Onetime Rising Democratic Star Faces Questions About Voter Privacy*, ProPublica (Jan. 28, 12:00 PM), <https://www.propublica.org/article/alison-lundergan-grimes-kentucky-onetime-rising-democratic-star-voter-privacy> (last accessed Feb. 25, 2019).

In an effort to clarify whether Defendants’ position is a legal disagreement or merely a philosophical one, counsel for Plaintiff contacted counsel for Defendants. *See Email, attached as Exhibit 4.* Counsel for Plaintiff even suggested that an agreement between the parties that Plaintiff is legally entitled to access the VRS could result in the expeditious completion of this case. Counsel for Defendants did not respond—a reflection that the Defendants do contend that Plaintiff is legally prohibited from access to the VRS. This is an actual, live controversy remediable by a declaration from the Court.

Defendants’ incorrect “opinion” and conduct are causing harm to the Commonwealth’s ability to promote free and fair elections. Plaintiff must access the VRS “to provide accurate and timely service and information to the voting public, elected officials, county election officials, and candidates for political office.” Helm Aff. ¶¶ 5, 10. Plaintiff’s access to the VRS is essential for the Office of the Secretary of State to ensure that properly registered voters are able to vote.

The VRS system allows the Office of the Secretary of State to provide information to the citizens of Kentucky in a thorough, accurate, and timely manner. Mary Sue Helm of the Office of the Secretary of State recently used the VRS to ensure that properly registered students would be able to vote in upcoming primary elections. *See, e.g., id.* ¶ 8. Employees of the Office of the Secretary of State also must access the VRS to confirm “for elected officials and candidates for office that the individuals who have signed or intend to sign the candidate’s candidacy paperwork are registered members of the same party as the candidate and/or reside in the correct voting district,” as was the recent case of State Representative John Blanton. *Id.* ¶ 9. And for non-partisan judicial races, employees use the VRS to ensure that the two individuals who have signed the nominating petition reside in the candidate’s district. Employee access to the VRS also promotes the integrity of Kentucky’s elections. The Office of the Secretary of State recently

used the VRS to confirm that poll workers met statutory requirements and to answer last-minute registration questions on election days as well as post-election day calls. *Id.* ¶¶ 11, 12. Ms. Helm’s Affidavit shows that Plaintiff must access the VRS to comply with its legal duties, and that Defendants’ legal opinions are adversely affecting Plaintiff’s compliance abilities.

Employees also accessed the VRS to respond to press inquiries, ensuring that the public remains informed. Helm Aff. ¶ 13. This is a common occurrence. *See* **Emails, attached as Exhibit 5**. Defendants’ position is contrary to the public’s right to access voter registration information in accordance with KRS 116.095, Kentucky Attorney General Opinion 16-ORD-137, and similar federal laws.

A declaration would terminate this controversy. As the Executive Director and Assistant to the Executive Director who is also a lawyer, Defendants are the individuals statutorily responsible for overseeing SBE staff. But Defendants are advising SBE staff and engaging in a publicity campaign contrary to the law. Defendants’ actions have left SBE staff and employees of the Office of the Secretary of State confused about VRS access and have chilled the important function of the employees of the Office of the Secretary of State necessary to protect the Commonwealth’s free elections. A declaration here would resolve the controversy because it would bind the Defendants and therefore would provide the clarity necessary for the SBE staff to assist Plaintiff and its employees in carrying out Plaintiff’s obligations under federal and state law.

These actions give rise to an actual, justiciable controversy between Plaintiff and Defendants. Accordingly, Defendants’ motion to dismiss should be denied.

LEGAL STANDARD

“When a motion to dismiss a complaint seeking a declaration of rights is filed, the question presented to the circuit court is. . . whether the complaint states a cause of action for declaratory relief.” *Curry v. Coyne*, 992 S.W.2d 858, 859 (Ky. App. 1998) (citation omitted). “The complaint must be construed in the light most favorable to the plaintiff and all allegations taken as true.” *Id.* (citation omitted).

“For a cause to be justiciable, there must be a present and actual controversy presented in good faith by parties with adverse interests in the subject to be adjudicated.” *Appalachian Racing, LLC v. Family Tr. Found. of Ky., Inc.*, 423 S.W.3d 726, 735 (Ky. 2014). “To render the controversy . . . justiciable[,] plaintiff should aver [its] legal rights in the premises and that defendant claims other or contrary rights or occupies some official relation thereto with imposed duties which if exercised would impair, thwart, obstruct or defeat plaintiff in [its] rights.” *Revis v. Daugherty*, 287 S.W. 28, 29 (Ky. 1926). “The criterion that should govern the courts is not that there is a present controversy but a justiciable controversy over present rights, duties or liabilities.” *Dravo v. Liberty Nat. Bank & Tr. Co.*, 267 S.W.2d 95, 97 (Ky. 1954).

ARGUMENT

I. There is an actual controversy between Defendants and Plaintiff regarding Plaintiff’s legal right to access the VRS.

An actual, justiciable controversy exists over whether Plaintiff has the right to access the VRS, which is necessary to carry out duties under federal and state laws. As the Commonwealth’s Chief Election Official, Plaintiff has a duty under numerous federal laws to access the VRS. *See, e.g.*, 52 U.S.C. §§ 20301(b)(1); 20302(b); 20504(c)(2)(B)(ii), 20504(c)(2)(E); 20504(d); 20504(e)(1)–(2); 20505(b); 20507(a)(4); 20507(b)(2); 20507(c)(2)(A); 20507(d)(1); 20507(d)(3); 20507(e)(2)(A)(i)–(ii); 20507(e)(3); 20507(f);

20507(g)(1); 20507(g)(3); 20507(g)(5); 20507(i)(1)–(2); 20509; 21082(a)(4); and 21083(a)(1)(A)(iv)–(v). In order for Plaintiff to comply with these obligations as Chief Election Official, Plaintiff must utilize the Office of the Secretary of State staff and the SBE staff, and Plaintiff must access the VRS. As alleged in the Complaint, Defendants, in their official capacities, have interfered with Plaintiff’s right to access the VRS. *See, e.g.* Compl. ¶ 5. Although the allegations in the complaint alone are sufficient at this stage, an employee has also sworn that Defendants’ legal position has “caused confusion and concern” among those individuals Plaintiff relies on to carry out Plaintiff’s various duties. *See* Helm Aff. ¶ 6. Because Defendants continue to advance their incorrect legal position concerning the right of the Office of the Secretary of State to access the VRS, they have impaired the ability of staff from the Office of the Secretary of State and the SBE to assist Plaintiff in carrying carry out the duties imposed on the Office of the Secretary of State by federal and state laws. Because Defendants have inserted themselves between Plaintiff and the staff, there exists an actual, justiciable controversy here. *See Revis*, 287 S.W. at 29 (“To render the controversy . . . justiciable[,] plaintiff should aver [its] legal rights in the premises and that defendant claims other or contrary rights or occupies some official relation thereto with imposed duties which if exercised would impair, thwart, obstruct or defeat plaintiff in [its] rights.”).

Defendants are the Executive Director and the Assistant to the Executive Director of the SBE. Defendant Scutchfield is also a lawyer for the Commonwealth of Kentucky by Executive Order of the Governor. In these capacities, Defendants’ legal positions and statements to staff members have the effect of directives. Defendants asserted in their public letter to the SBE that it is legally improper for Plaintiff to have any access to the VRS. *See* Compl. ¶ 13. They have initiated several administrative investigations based on their incorrect legal opinion. They have

also advised staff consistent with this erroneous legal position. They have taken their campaign to news outlets. Defendants’ advancement of their erroneous legal position in performance of their official duties is having a derogatory impact on SBE and Office of the Secretary of State staff’s ability to perform their duties, which require access to the VRS. *See, e.g.*, Compl. ¶ 5; Helm Aff. ¶ 6. The fact that Defendants—high-level government officials with management authority—have a “difference of opinion” with the Secretary of State demonstrates the actual, justiciable controversy over Plaintiff’s present right to the assistance of staff to carry out Plaintiff’s duty under federal and state laws by accessing the VRS. *See Dravo*, 267 S.W.2d at 97 (“The criterion that should govern the courts is not that there is a present controversy but a justiciable controversy over present rights, duties or liabilities.”). Defendants’ motion to dismiss should be denied.

II. A declaration of rights would terminate the controversy between Defendants and Plaintiff concerning Plaintiff’s legal right to access the VRS.

Defendants allege that the unfounded uncertainty they have created with respect to Plaintiff’s legal right to access the VRS would not be terminated by entry of a declaration of rights that is binding only against Defendants Dearing and Scutchfield as they have “no authority to prohibit Plaintiff’s VRS access.” Mot. to Dis. at 7. To the contrary, the declaration Plaintiff seeks would terminate precisely the present controversy between Plaintiff and Defendants as it would resolve the disharmony and uncertainty among SBE and Office of the Secretary of State staff created by Dearing’s and Scutchfield’s campaign to undermine Plaintiff’s legal right to access the VRS. *See* Compl. ¶ 5. Defendant Dearing is the statutorily appointed Executive Director of the SBE, and Defendant Scutchfield is the statutorily appointed Assistant to the Executive Director of the SBE, which is the state agency responsible for “administer[ing] the election laws of the state and supervis[ing] registration and purgation of voters within the state”

pursuant to KRS 117.015, *et seq.* Compl. ¶ 8. Thus, Defendants are not mere members of the public questioning Plaintiff's conduct—they are statutorily appointed employees of SBE who have advanced their legally erroneous position that Plaintiff should be restricted from accessing the VRS. And, as set forth above, Defendants admit that they have “expressed their opinion that Plaintiff's access to the VRS is improper.” Mot. to Dis. at 2. Defendants, in the performance of their official duties, have pursued a public strategy in direct derogation of Plaintiff's legal right to access the VRS by: publicly releasing their erroneous letter to the SBE Board, Compl. ¶ 12, Exhibit 1; initiating several administrative investigations; advising SBE staff in a manner inconsistent with the right of the Secretary of State to access the VRS, Compl. ¶ 14; and using the national news media to promote their incorrect legal theory. In short, Defendants are *exactly* the parties necessary to resolve the controversy over whether Plaintiff has the right to assistance of staff to carry out Plaintiff's legal duties by accessing the VRS.

The current disharmony and uncertainty surrounding Plaintiff's right to access the VRS has a single root cause—the erroneous legal position maintained by Defendants. Contrary to Defendants' allegations, the declaration Plaintiff seeks from this Court does not seek to restrain Defendants' right to free expression. *See* Mot. to Dis. at 8. Rather, the declaration Plaintiff seeks is a binding interpretation of Plaintiff's right to access the VRS. Such a declaration would completely resolve the present controversy as it would resolve the disharmony and uncertainty among SBE and Office of the Secretary of State staff caused by Defendants' advancement of their erroneous legal position.

Plaintiff welcomes Defendants' participation in the political process, even if that means Defendants wish to encourage the United States Congress to change the current laws governing VRS access. Plaintiff seeks only to prevent disruption of Plaintiff's attempts to comply with

current legal obligations. When Defendants incorrectly advise staff on what the law *is*, as they have done here, Compl. ¶ 14, they use their authority to impair Plaintiff's ability to comply with applicable laws. A declaration on this issue would resolve this actual, justiciable controversy.

CONCLUSION

Defendants' actions have resulted in disharmony and uncertainty that continues to plague SBE and Office of the Secretary of State staff. Defendants' conduct and admission that they have a "difference of opinion" with the Office of the Secretary of State is a justiciable case or controversy. Accordingly, for this and the reasons set forth above, this Court should deny Defendants' motion to dismiss Plaintiff's complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified by the undersigned attorney that a true copy of the foregoing Response in Opposition to Defendants' Motion to Dismiss was served via email this 26th day of February, 2019, upon the following:

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EXHIBIT 1

52 USC 21083: Computerized statewide voter registration list requirements and requirements for voters who register by mail

Text contains those laws in effect on February 25, 2019

From Title 52-VOTING AND ELECTIONS

Subtitle II-Voting Assistance and Election Administration

CHAPTER 209-ELECTION ADMINISTRATION IMPROVEMENT

SUBCHAPTER III-UNIFORM AND NONDISCRIMINATORY ELECTION TECHNOLOGY AND ADMINISTRATION REQUIREMENTS

Part A-Requirements

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§21083. Computerized statewide voter registration list requirements and requirements for voters who register by mail**(a) Computerized statewide voter registration list requirements****(1) Implementation****(A) In general**

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State (in this subsection referred to as the "computerized list"), and includes the following:

- (i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.
- (ii) The computerized list contains the name and registration information of every legally registered voter in the State.
- (iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.
- (iv) The computerized list shall be coordinated with other agency databases within the State.
- (v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.
- (vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.
- (vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).
- (viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance**(A) In general**

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

- (i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.], including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg–6) [now 52 U.S.C. 20507].
- (ii) For purposes of removing names of ineligible voters from the official list of eligible voters—
 - (I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg–6(a)(3)(B)) [now 52 U.S.C. 20507(a)(3)(B)], the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)) [now 52 U.S.C. 20507(a)(4)(A)], the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)) [now 52 U.S.C. 20503(b)], that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that-

- (i) the name of each registered voter appears in the computerized list;
- (ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list;
- and
- (iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general

Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes-

- (I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or
- (II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number

If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided

The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases

The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security

The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of title 42 (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of 1974 (5

U.S.C. 552a note), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–4(c)) [now 52 U.S.C. 20505(c)] and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if-

- (A) the individual registered to vote in a jurisdiction by mail; and
- (B)(i) the individual has not previously voted in an election for Federal office in the State; or
- (ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a).

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual-

- (i) in the case of an individual who votes in person-
 - (I) presents to the appropriate State or local election official a current and valid photo identification; or
 - (II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or
- (ii) in the case of an individual who votes by mail, submits with the ballot-
 - (I) a copy of a current and valid photo identification; or
 - (II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person

An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 21082(a) of this title.

(ii) By mail

An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 21082(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person-

- (A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–4) [now 52 U.S.C. 20505] and submits as part of such registration either-
 - (i) a copy of a current and valid photo identification; or
 - (ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;
- (B)(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–4) [now 52 U.S.C. 20505] and submits with such registration either-
 - (I) a driver's license number; or
 - (II) at least the last 4 digits of the individual's social security number; and
- (ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or
- (C) who is-
 - (i) entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [52 U.S.C. 20301 et seq.];
 - (ii) provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or
 - (iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–4) [now 52 U.S.C. 20505] shall include the following:

- (i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form."

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) [now 52 U.S.C. 20501 et seq.] before October 29, 2002, to comply with such a provision after October 29, 2002.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection (b) on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) shall apply to any individual who registers to vote on or after January 1, 2003. (Pub. L. 107–252, title III, §303, Oct. 29, 2002, 116 Stat. 1708 .)

REFERENCES IN TEXT

The National Voter Registration Act of 1993, referred to in subsecs. (a)(2)(A)(i), (4)(A) and (b)(5), is Pub. L. 103–31, [May 20, 1993](#), 107 Stat. 77 , which is classified principally to chapter 205 (§20501 et seq.) of this title. For complete classification of this Act to the Code, see Tables.

Section 7 of the Privacy Act of 1974, referred to in subsecs. (a)(5)(D) and (c), is section 7 of Pub. L. 93–579, which is set out as a note under section 552a of Title 5, Government Organization and Employees.

The Uniformed and Overseas Citizens Absentee Voting Act, referred to in subsec. (b)(3)(C)(i), is Pub. L. 99–410, [Aug. 28, 1986](#), 100 Stat. 924 , which is classified principally to chapter 203 (§20301 et seq.) of this title. For complete classification of this Act to the Code, see Tables.

CODIFICATION

Section was formerly classified to section 15483 of Title 42, The Public Health and Welfare, prior to editorial reclassification and renumbering as this section.

Section is comprised of section 303 of Pub. L. 107–252. Subsec. (a)(5)(C) of section 303 of Pub. L. 107–252 amended section 405 of Title 42, The Public Health and Welfare.

EXHIBIT 2

§ 9428.7

11 CFR Ch. II (1–17 Edition)

(1) All voter registration eligibility requirements of that state and their corresponding state constitution or statutory citations, including but not limited to the specific state requirements, if any, relating to minimum age, length of residence, reasons to disenfranchise such as criminal conviction or mental incompetence, and whether the state is a closed primary state.

(2) Any voter identification number that the state requires or requests; and

(3) Whether the state requires or requests a declaration of race/ethnicity;

(4) The state's deadline for accepting voter registration applications; and

(5) The state election office address where the application shall be mailed.

(b) If a state, in accordance with 11 CFR 9428.4(a)(2), requires the applicant's full social security number, the chief state election official shall provide the Commission with the text of the state's privacy statement required under the Privacy Act of 1974 (5 U.S.C. 552a note).

(c) Each chief state election official shall notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported under this section.

[59 FR 32323, June 23, 1994. Redesignated and amended at 74 FR 35720, July 29, 2009]

Subpart C—Recordkeeping and Reporting

§ 9428.7 Contents of reports from the states.

(a) The chief state election official shall provide the information required under this section with the Commission by March 31 of each odd-numbered year beginning March 31, 1995 on a form to be provided by the Commission. Reports shall be mailed to: National Clearinghouse on Election Administration, Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005. The data to be reported in accordance with this section shall consist of applications or responses received up to and including the date of the preceding federal general election.

(b) Except as provided in paragraph (c) of this section, the report required under this section shall include:

(1) The total number of registered voters statewide, including both “active” and “inactive” voters if such a distinction is made by the state, in the federal general election two years prior to the most recent federal general election;

(2) The total number of registered voters statewide, including both “active” and “inactive” voters if such a distinction is made by the state, in the most recent federal election;

(3) The total number of new valid registrations accepted statewide between the past two federal general elections, including all registrations that are new to the local jurisdiction and re-registrations across jurisdictional lines, but excluding all applications that are duplicates, rejected, or report only a change of name, address, or (where applicable) party preference within the local jurisdiction;

(4) If the state distinguishes between “active” and “inactive” voters, the total number of registrants statewide that were considered “inactive” at the close of the most recent federal general election;

(5) The total number of registrations statewide that were, for whatever reason, deleted from the registration list, including both “active” and “inactive” voters if such a distinction is made by the state, between the past two federal general elections;

(6) The statewide number of registration applications received statewide (regardless of whether they were valid, rejected, duplicative, or address, name or party changes) that were received from or generated by each of the following categories:

(i) All motor vehicle offices statewide;

(ii) Mail;

(iii) All public assistance agencies that are mandated as registration sites under the Act;

(iv) All state-funded agencies primarily serving persons with disabilities;

(v) All Armed Forces recruitment offices;

(vi) All other agencies designated by the state;

Election Assistance Commission

§§ 9430.2–9430.5

(vii) All other means, including but not limited to, in person, deputy registrars, and organized voter registration drives delivering forms directly to registrars;

(7) The total number of duplicate registration applications statewide that, between the past two federal general elections were received in the appropriate election office and generated by each of the categories described in paragraphs (b)(6) (i) through (vii) of this section;

(8) The statewide number of confirmation notices mailed out between the past two federal general elections and the statewide number of responses received to these notices during the same period;

(9) Answers to a series of questions with categorical responses for the state to indicate which options or procedures the state has selected in implementing the NVRA or any significant changes to the state's voter registration program; and

(10) Any additional information that would be helpful to the Commission for meeting the reporting requirement under 42 U.S.C. 1973gg-7(a)(3).

(c) For the State report due March 31, 1995, the chief state election official need only provide the information described in paragraph (b)(2) of this sec-

tion and a brief narrative or general description of the state's implementation of the NVRA.

[59 FR 32323, June 23, 1994, as amended at 59 FR 64560, Dec. 15, 1994. Redesignated and amended at 74 FR 37520, July 29, 2009; 75 FR 49815, Aug. 16, 2010]

PART 9430—DEBT COLLECTION

Sec.

9430.1 Cross-reference to executive branch-wide debt collection regulations.

9430.2–9430.5 [Reserved]

AUTHORITY: 31 U.S.C. 3716(b); 31 U.S.C. 3711(d)(2); 31 CFR parts 900–904.

SOURCE: 74 FR 27906, June 12, 2009, unless otherwise noted.

§ 9430.1 Cross-reference to executive branch-wide debt collection regulations.

The U.S. Election Assistance Commission adopts the regulations at 31 CFR parts 900–904, governing administrative collection, offset, compromise, and the suspension or termination of collection activity for civil claims for money, funds, or property, as defined by 31 U.S.C. 3701(b).

§§ 9430.2–9430.5 [Reserved]

PARTS 9431–9499 [RESERVED]

EXHIBIT 3

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 19-CI-0087
Electronically Filed

COMMONWEALTH OF KENTUCKY
OFFICE OF THE SECRETARY OF STATE, *ex rel.*
ALISON LUNDERGAN GRIMES, in her official
capacity as Secretary of State of the Commonwealth
of Kentucky

PLAINTIFF

v.

AFFIDAVIT OF MARY SUE HELM

JARED DEARING

DEFENDANT

and

JENNIFER SCUTCHFIELD

DEFENDANT

**** *
**** *
**** *
**** *

I, Mary Sue Helm, being duly sworn and cautioned, states as follows:

1. I have personal knowledge as to the matters appearing in this affidavit.
2. I am currently the Director of Administration and Elections in the Office of the Kentucky Secretary of State.
3. I have worked in the Office of the Kentucky Secretary of State since 1988, serving in the administrations of Secretaries of State from both the Democratic and Republican parties. I served as the Director of Administration under Secretary Bremer Ehrler and both the Director of Administration and Director of Corporations during Secretary Bob Babbage's administration. I began my tenure as Director of Elections under Secretary Babbage when the position was created in the mid-1990s, and continued in that capacity under Secretary John Y. Brown, III, and Trey Grayson, until March, 2008. In October, 2008, I returned to the Office of the Secretary of State assuming the same election duties and responsibilities until Secretary Trey Grayson resigned in 2010. I continued overseeing elections under Secretary Elaine Walker

through 2011. Presently, I am Director of Elections and Administration under the current Secretary, Alison Lundergan Grimes and have served since 2012.

4. In addition to my work in the Office of the Kentucky Secretary of State, I served as the acting Executive Director of the Kentucky State Board of Elections (“SBE”) for four and half years during the administration of Secretary John Y. Brown, III, and for two months in 2017 during the administration of Secretary Alison Lundergan Grimes.

5. My duties as Director of Administration and Elections require that I have access to the information contained in the Kentucky Voter Registration System database (the “VRS”) in order to provide accurate and timely service and information to the voting public, elected officials, county election officials, media, and candidates for political office.

6. The statements publicly advanced by SBE Executive Director Jared Dearing (“Dearing”) and Assistant Executive Director Jennifer Scutchfield (“Scutchfield”) that the Office of the Secretary of State staff, including myself, should be denied access to the VRS has caused confusion and concern to me and other Secretary of State staff. As a 30+ year veteran of the Secretary of State’s office and former acting Executive Director of SBE—the Secretary of State staff should not be denied access to the information contained in the VRS. As a result of these statements, I have been reluctant to use the VRS to fulfill my duties.

7. Furthermore, I would not be able to adequately perform my official duties absent access to the information contained in the VRS database.

8. For example, I was recently contacted by a teacher who helped his students register to vote. The teacher told me that when the students looked up their voter registration information in the SBE’s on-line Voter Information Center (“VIC”), the information indicated that the students were not eligible to vote in the upcoming statewide primary election. Using my

access to a read-only copy of the VRS database, I was able to look up the students' voter information, including party affiliation—which is necessary to confirm an individual's ability to participate in a party's primary election—and confirm that the students were in fact eligible to vote in the primary election of their registered party. I would not have been able to provide this service—contrary to the incorrect information in the VIC—if I did not have access to the VRS database.

9. Another service I frequently provide in my role as Director of Administration and Elections that requires access to the VRS database is confirming for elected officials and candidates for a partisan office that the individuals who have signed or intend to sign the individual's candidacy paperwork are registered members of the same party as the candidate and/or reside in the district or jurisdiction of the office the candidate is seeking; and for non-partisan judicial offices that the two individuals who have signed the candidate's nominating petition are registered voters in the district the candidate is seeking. For example, State Representative John Blanton visited the Secretary of State's office in January 2018 and inquired about the residence of his signers. When I looked up the individuals in the VRS database, I noticed that the house numbers provided by the signers did not match VRS records. I contacted Dearing at SBE to determine if the 911 changes to house numbers in one precinct in Magoffin County had been changed in the VRS system. Dearing did not timely respond to my question. Accordingly, I informed Representative Blanton that I could not confirm the residency of his signers based on VRS records, and he decided to file new candidacy paperwork. I would not be able to provide this service to elected officials and candidates—or to alert SBE to potential issues in their records—without access to the VRS database.

10. Voters frequently contact the Secretary of State before the end of the year about party registration changes. Voters who wish to vote in a different party's primary election or seek office as a candidate of a different party must make changes by December 31st pursuant to KRS 116.055. Last December, a voter called me on December 28, 2018 attempting to update his voter registration record online. He was unable to access the information and make changes through our online system. Because of my access to VRS, I was able to determine that the voter's date of birth had been entered incorrectly and that he was registered and eligible to vote in the primary election. This issue could not have been resolved without access to the VRS database.

11. Another service the Secretary's Office provides is helping to obtain precinct poll workers for Election Day. For example, in May 2018, the Secretary of State issued a press release to state employees calling for additional poll workers for the May 22 Primary Election due to low response statewide. (See **Exhibit 1 hereto**). Using access to the VRS database, Office of the Secretary of State staff helped county election officials confirm poll worker applicants' eligibility to serve, by confirming their residency and political party affiliation, as required by Kentucky law. This service could not have been provided to county officials without access to the VRS database.

12. I also frequently use the VRS database to resolve issues from the voting public pre-election, election day and post election days. The Office of the Secretary of State responds to a high volume of calls related to voter registration issues during this period of time, and the ability to timely and accurately resolve these issues requires access to the VRS database.

13. The Office of the Secretary of State has also used the VRS to respond to press inquiries. For example, the Office was contacted in November 2018 by a reporter for the

Courier-Journal asking when a candidate for United States Representative first registered to vote. (See Exhibit 2 hereto). The Office was able to respond to the reporter's request by accessing public information about the candidate that is available in the VRS.

FURTHER AFFIANT SAITH NAUGHT.

Mary Sue Helm
Mary Sue Helm

STATE OF Kentucky)
)
COUNTY OF Franklin) SS:

The foregoing affidavit was acknowledged before me this 26 day of February, 2019, by Mary Sue Helm.

Matt Paley
Notary Public
exp. 2/24/2021

EXHIBIT 4

From: O'Gara, Daniel
Sent: Wednesday, February 20, 2019 3:46 PM
To: Iaccarino, Carmine G (PPC)
Cc: Downs, Jared L (PPC); Becker, Heather L (KREC)
Subject: Grimes v. Dearing

Mr. Iaccarino,

I reviewed your motion to dismiss in the above matter. While you concede that your clients have an opinion that access to the VRS by the Office of the Secretary of State is "improper," you do not specify whether they believe it is legally "improper" as opposed to improper in some philosophical or moral sense. In an effort to evaluate whether this litigation is necessary, do your clients agree that they do not currently contend that it is a violation of a current law for the Office of the Secretary of State to access the VRS? If they are willing to agree that they do not so contend, perhaps further litigation is unnecessary.

Danny


Daniel J. O'Gara
Associate

Dinsmore & Shohl LLP • Legal Counsel
101 South Fifth Street
Suite 2500
Louisville, KY 40202
T (502) 540-2353 • **F** (502) 585-2207
E daniel.ogara@dinsmore.com • dinsmore.com

EXHIBIT 5

From: pachen@portlandtribune.com
Sent: Wednesday, April 25, 2018 6:12 PM
To: Queen, Bradford (SOS)
Subject: Re: On deadline: voter registration

Thank you.

From: Queen, Bradford (SOS) <bradford.queen@ky.gov>
Sent: Wednesday, April 25, 2018 12:55 PM
To: Paris Achen
Subject: RE: On deadline: voter registration

Paris,

We do not have any record for Samuel Stephen Carpenter, DOB 10/28/1949.

Please let me know if you have any questions or feel free to give me a call.

Bradford Queen
Director of Communications
Kentucky Secretary of State Alison Lundergan Grimes
502.782.7407 | cell: 502.330.9839
Bradford.Queen@ky.gov
sos.ky.gov



From: pachen@portlandtribune.com <pachen@portlandtribune.com>
Sent: Wednesday, April 25, 2018 2:37 PM
To: Queen, Bradford (SOS) <bradford.queen@ky.gov>
Subject: On deadline: voter registration

Hi Bradford -

I'm trying to look up a former Kentucky resident in your voter registration database but haven't been able to find him. How far back does the database go? Would it include the period before 2006?

The person I'm searching for is Samuel Stephen Carpenter or Samuel S. Carpenter, DOB 10/28/1949.

Thank you.

- Paris Achen
Portland Tribune
Portland, Oregon
cell 541-840-3626

From: Beam, Adam <ABeam@ap.org>

Sent: Wednesday, August 15, 2018 5:21:57 PM

To: Queen, Bradford (SOS)

Subject: Voter registration

Hey Bradford,

Have you had a chance to check the ages of people who recently registered to vote in Kentucky? I'm curious to know if the Democratic party is registering more younger voters while the Republican party is registering more older voters.

Thanks,

Adam

<image001.jpg>

Adam Beam

State government reporter

abeam@ap.org

www.ap.org

<image002.jpg>

Kentucky State Capitol
700 Capitol Avenue, Room 243
Frankfort, KY 40601

Mobile: 502-216-8071

Office: 502-227-2410

Twitter: @adambeam

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 19-CI-0087
Electronically Filed

COMMONWEALTH OF KENTUCKY
OFFICE OF THE SECRETARY OF STATE, *ex rel.*
ALISON LUNDERGAN GRIMES, in her official
capacity as Secretary of State of the Commonwealth
of Kentucky

PLAINTIFF

v.

ORDER

JARED DEARING

DEFENDANT

and

JENNIFER SCUTCHFIELD

DEFENDANT

**** *
**** *
**** *
**** *

The Court, having considered Defendants' Motion to Dismiss, Plaintiff's response, having heard the argument of counsel, and being otherwise sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED:

Defendants' Motion to Dismiss is DENIED.

So ORDERED this the ____ day of _____, 2019.

Franklin Circuit Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed and served on the following parties by United States mail, postage prepaid, on this the ____ day of _____, 2019.

Daniel J. O'Gara
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101 South Fifth Street, Suite 2500
Louisville, Kentucky 40202
(502) 540-2300
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*Counsel to the Office of the Secretary of
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*Counsel for Defendants, Jared Dearing
and Jennifer Scutchfield*

Clerk, Franklin Circuit